

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

MAY 7 2012

Finance Docket No. 30186 (Sub-No. 2) ✓ 232274 3

TONGUE RIVER RAILROAD COMPANY - RAIL CONSTRUCTION
AND OPERATION-ASHLAND TO DECKER, MONTANA

232274

Finance Docket No. 30186 (Sub-No. 3)

TONGUE RIVER RAILROAD COMPANY, INC. - CONSTRUCTION
AND OPERATION-WESTERN ALIGNMENT

REPLY TO PETITIONS

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Dated: May 7, 2012

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PRELIMINARY STATEMENT

Native Action, Inc. hereby submits this reply to the Petitions, jointly filed April 17, 2012, by Northern Plains Resource Council (NPRC) and Mark Fix (FIX), and (2) separately filed April 19, 2012, by Tongue River Railroad Company, Inc. (TRRC). Both petitions seek to govern further proceedings in both F.D. No. 30186 (Sub-No. 2) (TRRCII), and F.D. No. 30186 (Sub-No. 3) (TRRCIII), to be adopted by the Surface Transportation Board (STB) upon remand from the reviewing court.1/

1/ Northern Plains Resource v. Surface Transp. Bd., 668 F.3d 1067 (9th Cir. Dec. 29, 2011), reh. Den. ___ F.3d. ___ (Feb. 23, 2012).

1. The Petitions. The NPRC/FIX Petition seeks to reopen TRRCII and TRRCIII for a new Supplemental Environmental Impact Statement (SEIS) in TRRCI. This would be in addition to the pending NPRC/FIX Petition for Reconsideration to reopen TRRCI, TRRCII, and TRRCIII, filed July 25, 2011. NPRC/FIX suggest a procedural schedule for hearings, along with an updated and accurate service list.

The TRRC Petition, identified as a "Notice of Intent", expresses TRRC's intent to no longer construct the rail lines south of Ashland, MT, which were the subject of TRRCII and TRRCIII; and to withdraw its TRRCII application. TRRC further expresses an intent to file an amended TRRCIII application to seek necessary approval for refinements to the rail line proposed in TRRCI, and which were considered in the TRRCIII proceeding; as well as to provide updated information in regard to TRRC's ownership, traffic forecasts, financial projections, and updates for other matters.

2. Status of Remand. The STB has not issued an Order on Remand reopening TRRCII or TRRCIII, with proper notice to the public. The usual procedure is for the STB to issue a new notice, rather than the parties, as here, to take the initiative.^{2/}

TRRCII was filed in 1991; and TRRCIII was filed in 1998.

2/ Cf. F.D. No.33407, Dakota, Minnesota & Eastern Railroad Company Corporation Construction into the Powder River Basin (served March 3, 2004), following MidStates Coalition for Progress v. STB, 345 F.3d 520 (8th Cir. Oct. 2003), reh.den. Jan.30, 2004.

Changes in the interests of the parties, including additional or dropped parties, as well as other concerns, support issuance of a new public notice. Additionally, TRRCII and TRRCIII concerned proposed rail line construction primarily for "bridge" coal trains, whereas TRRCI primarily concerns proposed originated rail traffic. There have undoubtedly been changes in circumstances and interests in the intervening years.

Furthermore, is not clear whether the court litigation has concluded at this time. The deadline for seeking Supreme Court certiorari will not expire until May 23, 2012.^{3/}

ARGUMENT

Native Action, Inc. anticipates that further information will be provided that will impact its reply to the two aforementioned Petitions; and therefore reserves the right to supplement its reply.

1. Dismissal. TRRC's announcement that it no longer intends to construct the rail lines south of Ashland, MT, that were the subject of TRRCII and TRRCIII, requires that those proceedings be dismissed. The applications have become moot. TRRC has stated its intent to withdraw TRRCII, but to maintain certain modifications to TRRCI, which were considered in TRRCIII.

The STB should reject such use for TRRCIII. The proper manner for such preservation and use of pertinent portions of

^{3/} Moreover, a further 60-day extension is possible. 28 U.S.C. 2101(c).

the TRRCIII record, is to incorporate such pertinent portions into TRRCI pursuant to Board rules, e.g., 49 CFR 112.27,1113.10. Other options are an amended TRRCI or filing a TRRCIV. Native Action expresses no opinion on such alternatives at this time.

2. BNSF/Arch Coal/Mars Agreement. Native Action, Inc. is aware of a purported agreement, entered into on or about July 1, 2011, for the sale of TRRC to Tongue River Holding Co., in which 1/3 interests are held by BNSD, Arch Coal, and "a non-rail private industrial entity." FD 30186 (Sub-No. 2), Report (7/8/11). The latter entity has been identified as TRR Financing, LLC, controlled by Forrest E. Mars, Jr. (Amended Report (8/29/11)).

Native Action, Inc. has not seen the purported agreement; however, the involvement of BNSF raises questions as to BNSF control, or power to control TRRC, and whether BNSF should be joined as an applicant in TRRCI.

Native Action, Inc. expresses no opinion at this time on the above serious matters, other than to suggest that the purported agreement be made available to the public; and that TRRCII and TRRCIII be dismissed.

Respectfully Submitted,



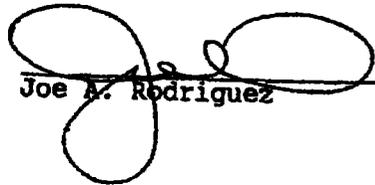
Joe A. Rodriguez
Attorney for Native Action, Inc.

Dated: May 7, 2012

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon all parties of record by first class mail with postage prepaid.

May 7, 2012


Joe A. Rodriguez